

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of

Safemark Systems, LP, For Retroactive
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)

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CG Docket No. 02-278

CG Docket No. 05-338

**SAFEMARK SYSTEMS, LP, REPLY REGARDING
PETITION FOR RETROACTIVE WAIVER OF C.F.R. § 64.1200(a)(4)(iv)**

Petitioner Safemark Systems, LP, (“Safemark” or “Petitioner”) by and through its undersigned counsel, and pursuant to the Public Notice issued by the Federal Communications Commission (the “FCC”) on October 28, 2016 in Docket Nos. 02-278 and 05-338,¹ and Section 1.3 of the FCC’s Rules,² respectfully files this Reply in response to the single comment,³ an opposition posted on November 15, 2016 (the “Comment”) by Gorss Motels, Inc. (“GMI”) filed by its counsel Anderson + Wanca, in response to Safemark’s request that the FCC grant a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Regulation”) with respect to the opt-out notice requirement for solicited faxes sent by or on behalf of Safemark before April 30, 2015. The Commission has granted over 150 retroactive waivers to parties similarly-situated to Safemark.⁴ Petitioner asks for the same relief.

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notice on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice DA-16-1231 (rel. October 28, 2016).

² 47 C.F.R. § 1.3.

³ *TCPA Plaintiffs’ Comments on Petition for Retroactive Waiver filed by Safemark Systems, LP*, CG Docket Nos. 02-278, 05-338 (received November 14, 2016, posted November 15, 2016) (hereinafter the “Comment”).

⁴ See, most recently *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, DA 16-1242 (“November 2016 Order”). See also, *Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991; Junk Fax Prevention Act of 2005; Application For Review Filed By Anda, Inc.; Petitions For Declaratory Ruling, Waiver, And/Or Rulemaking*

ARGUMENT

I. OVERVIEW

In its Petition⁵, Safemark sets forth the grounds for the FCC to grant a retroactive waiver of the Regulation: (1) the FCC already determined in the 2014 Anda Commission Order (and in FCC Orders since, see fn. 4 above) that good cause exists for a waiver of the Regulation; (2) the FCC expressly invited parties “similarly situated to the parties granted retroactive waivers in the 2014 Anda Commission Order to file their own waiver requests; (3) “no record evidence demonstrates that [Safemark] understood that [it] did, in fact, have to comply with the opt-out notice requirement for solicited facsimiles, but nonetheless failed to do so; (4) there is no evidence or admission that Safemark had a complete ignorance of the law; and, (5) Safemark appropriately referenced “the confusion between the footnote and the rule” giving rise to the relief requested in the Petition.

GMI, who is the plaintiff in a TCPA putative class action against Safemark, opposes the Petition and filed its Comment which is, in large part, identical to the Comment filed by the same counsel, and already ruled on by the FCC, with regard to Petitions of Schwabe North America, Inc., Amsterdam Printing & Litho Inc., and Cartridge World North America, LLC.⁶ GMI’s

Regarding Fax Opt-Out Requirements, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“2014 Anda Commission Order”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (2015) (“August 2015 Order”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (2015) (“December 2015 Order”); .

⁵ *Petition of Safemark Systems, LP For Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (received October 6, 2016, posted October 6, 2016) (hereinafter the “Petition”).

⁶ *Petition of Schwabe N. Am., Inc. for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed September 16, 2016) (“Schwabe Petition”); *Petition to Seek Retroactive Waiver for Temporary Relief from Past Requirements of 47 C.F.R. § 64.1200(a)(4)(iv) as Applicable to Solicited Faxes*, CG Docket Nos. 02-278, 05-338 (filed September 27, 2016) (“Amsterdam Petition”); *Petition of Cartridge World N. Am., LLC for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed August 19, 2016 (“Cartridge World Petition”); *TCPA Plaintiffs’ Comments on Petitions for Retroactive Waiver filed by Cartridge World North America, LLC, Schwabe North America, Inc, and Amsterdam*

Comment differs substantively from GMI's counsel's prior comment only as to an "ignorance of the law" allegation, which was only present as to Cartridge World LLC in the Schwabe, Amsterdam, and Cartridge World Comment.

In the instant comment GMI (with identical argument as set forth in the Schwabe, Amsterdam, and Cartridge World Comment) alleges: (1) the FCC has no authority to "waive" a defendant's statutory liability under 47 U.S.C. §227(b)(3) for violations of the "regulations prescribed under" the Telephone Consumer Protection Act ("TCPA"); and, (2) the Petition is untimely, where Safemark made no "effort" to file by April 30, 2015, as required by the October 30, 2014 Order. These arguments, and the FCC's response to the exact same arguments raised in the Schwabe, Amsterdam, and Cartridge World Comment and decided in the November 2016 Order discussed below. Safemark respectfully requests the outcome as to these first two arguments should be identical in this case to the outcome set forth by the FCC in the November 2016 Order, which was to grant the petition for waiver.

As to its third argument in opposition to the Petition, GMI alleges Safemark was "simply ignorant" of the law and the Petition should be denied. There is no such admission of total ignorance of the law in Safemark's Petition. In the event that the Petition was unclear, Safemark appropriately references the general confusion regarding the opt-out notice requirement for solicited faxes, similarly relied upon by all petitioners previously granted waivers, and there is no evidence in the record demonstrating that Safemark understood they were required to comply with the opt-out notice for solicited faxes and failed to do so. Therefore, the industry wide confusion that led to the granting of prior waivers is equally applicable to Safemark upon its Petition. Safemark should not be held to a higher standard than initial waiver recipients – evidence of

Printing & Litho, Inc., CG Docket Nos. 02-278, 05-338 (filed October 14, 2016) (the "Schwabe, Amsterdam, and Cartridge World Comment"); and the FCC's November 2106 Order, DA 16-1242.

actual, subjective confusion is not required. Therefore, Safemark respectfully requests that the FCC grant the relief requested in the Petition insofar as Safemark may have failed to comply with the opt-out notice requirement for fax advertisements sent with the prior express invitation or permission of the recipient prior to April 30, 2015.

II. THE FCC HAS AUTHORITY TO WAIVE REGULATIONS AND EXERCISING THIS AUTHORITY DOES NOT VIOLATE THE SEPARATION OF POWERS

As, GMI has argued in its Comment, numerous commenters in these proceedings have argued that the TCPA creates a private right of action to sue for “a violation of this subsection of the regulations provided under this subsection” and gives the FCC no power to “waive” that right. However, GMI omits the fact that this argument has been taken up by the FCC and been decided in favor of prior petitioners similarly situated to Safemark. In its most recent November 2, 2016 Order, the FCC decided, in pertinent part:

For the reasons discussed we find that the public interest is better served by granting limited retroactive waivers. At the outset, we dismiss arguments that granting waivers while litigation is pending violates the separation of powers, as one commenter has suggested. As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting and implementing a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut the Commission’s authority, as the expert agency, to define the scope of when and how its rules apply.

The Commission may waive its rules for good cause shown. A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would strict application of the rule. The Commission previously found that special circumstances warranted deviation from the general rule at issue here. Specifically, the Commission found two reasons for confusion or misplaced confidence among affected parties that the opt-out notice rule did not apply to fax ads sent with recipient consent: (1) inconsistency between a *Junk Fax Order* footnote and the rule, and (2) the notice provided prior to the rule, even though legally sufficient, did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.

See FCC November 2, 2016, Order DA 16-1242, at p. 8-9.

In the instant Petition, Safemark has demonstrated that is it similarly situated to prior waiver recipients, and that the FCC has authority to grant such waivers. Therefore, Safemark respectfully requests a limited retroactive waiver for fax ads sent with recipients' prior express consent or permission prior to April 30, 2015.

III. THE FCC DECLINES TO REJECT PETITIONS SOLELY ON THE BASIS THAT THEY WERE FILED AFTER APRIL 30, 2015

Regarding GMI's argument that Safemark's Petition is untimely, the FCC has rejected this same argument in both its *December 2015 Order* and *November 2016 Order*. In those Orders, the FCC noted that opponents of these petitions for waiver often argue that petitions are untimely because they were filed after April 30, 2015. See *December 2015 Order* at ¶15, and *November 2016 Order* at ¶18. In rejecting prior commenters arguments, including arguments of GMI's present counsel made on behalf of other clients, the FCC declined "to reject petitions solely on the basis that they were filed after April 30, 2015." *Id.* The FCC noted that the petitions "sought waiver for faxes sent prior to the April 30, 2015 deadline," which was the same relief afforded to the original petitioners, making the later filed petitions, including Safemark, still "similarly situated" to the initial waiver recipients. See *December 2015 Order* at ¶18; *also see* *November 2016 Order* at ¶8.

As such, granting the waiver requested by Safemark does not contradict the purpose or intent of the initial waiver order because Safemark is similarly situated to the initial waiver recipients. Therefore, Safemark respectfully requests a limited retroactive waiver for fax ads sent with recipients' prior express consent or permission prior to April 30, 2015.

IV. SAFEMARK'S PETITION MAKES NO ADMISSION OF IGNORANCE OF LAW

Safemark acknowledges a small number of previous petitioners have been denied waivers because they made admissions regarding ignorance of the TCPA and/or FCC rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express consent. *See, e.g., November 2015 Order* at ¶21. Safemark has not made such an admission in this Petition. However, in their comment GMI takes liberties by claiming that Safemark admits it did not know about the opt-out-notice requirement for any faxes so the argument will be addressed.

In the event that the Petition was unclear, Safemark appropriately references the general confusion regarding the opt-out notice requirement for solicited faxes, similar to all petitioners previously granted waivers, provides no admission of ignorance of the law, and sets forth no evidence demonstrating that Safemark otherwise understood they were required to comply with the opt-out notice for solicited faxes and failed to do so. To the extent that Safemark has alleged that it included what might be construed as limited opt out information in its faxes (e-mail and telephone number that could be used by a recipient who wished to opt-out), that information was not meant to be construed as an admission of total ignorance of the opt-out requirement, nor construed as an admission clearly understood the opt-out requirement and failed to comply. It was merely meant to highlight confusion, though Safemark is entitled to the presumption of confusion regarding their Petition, and has no obligation to set forth such proof.

The FCC has confirmed that petitioners are entitled to a presumption of confusion when seeking a limited retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) for solicited faxes. *See August 2015 Order* at ¶15; *See also November 2016 Order* at ¶21. To rebut the applicable presumption, GMI must point to some evidence that Safemark was completely ignorant of the opt-out requirements, or that it understood the opt-out requirements but failed to comply.

Additionally, the FCC has confirmed that it does “not require petitioners to plead specific, detailed grounds for individual confusion, and ... cannot impose that requirement now.” *See December 2015 Order* at ¶17.

In this case – GMI offers no evidence in their Comment that Safemark was completely ignorant of the opt-out requirements at the time it sent the complained of faxes. Further, GMI offers no evidence that Safemark understood it did, in fact, have to comply with the specific opt-out notice language and requirement for fax ads sent with prior express permission but failed to comply. Therefore, Safemark respectfully requests a limited retroactive waiver for fax ads sent with recipients’ prior express consent or permission prior to April 30, 2015.

V. CONCLUSION

For the foregoing reasons, Safemark respectfully requests that the Commission grant a retroactive waiver from the provisions of 47 C.F.R. Section 64.1200(a)(4)(iv) for facsimiles sent by or on behalf of Safemark, prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order*, affording the same relief previously granted by the Commission and the Bureau to 150+ similarly-situated petitioners.

Dated: November 21, 2016

Respectfully submitted,

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